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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. OSCAR HERNANDEZ, Defendant and Appellant.	B205018 (Los Angeles County Super. Ct. No. MA036632)
In re OSCAR HERNANDEZ, On Habeas Corpus.	B216466

APPEAL from a judgment of the Superior Court of Los Angeles County, John Murphy, Commissioner. ORIGINAL PROCEEDING; petition for a writ of habeas corpus. Judgment affirmed. Writ denied.

Sara H. Ruddy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Joseph P. Lee and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Oscar Hernandez appeals from the judgment entered following his conviction by jury of three counts of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).) He contends that trial counsel rendered ineffective assistance, which requires the reversal of one of the assault convictions. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 28, 2006, Harold (Joe) Sentner arrived at defendant's home on Regal Court in Lancaster. He went into the garage during a Halloween party hosted by defendant and his wife (Mrs. Hernandez). Guests were in the garage playing pool and Sentner joined them. Sometime between 9:00 and 9:30 in the evening, Mrs. Hernandez went into the garage looking for defendant. Sentner was drinking a beer and removing tobacco from a cigar. After seeing him drop the tobacco on the garage floor, Mrs. Hernandez asked Sentner to pick up the tobacco and leave.

Sentner refused. He stood up and pushed Mrs. Hernandez. Defendant saw them arguing as he was walking across the street from his neighbor's house. Defendant hit Sentner in the face, and he fell to the floor with a bloody nose. When Sentner left the party, Christian Angel, another guest, and Mrs. Hernandez heard Sentner say that he was going to come back and bring some of his homeboys with him. Angel said that at some point in the evening, Sentner came back to defendant's house and made more threats.

Sentner was acquainted with David Worley, who lived at the end of the cul-de-sac on Regal Court with his grandmother, Lena Worley. After leaving defendant's house, Sentner went to Mrs. Worley's doorstep, knocked on the front door, and refused to leave. Michael Baggett and Matthew Quinn, also grandsons of Mrs. Worley, were visiting and playing computer games that evening. Mrs. Worley asked Baggett and Quinn to escort Sentner off the property and they agreed to do so. Baggett noticed Sentner was intoxicated. Sentner appeared to be injured and he mumbled something about having been attacked on the way to the house. Sentner said he was afraid of being attacked by

defendant again, and asked if Baggett and Quinn would escort him to the end of the street.

Baggett, Quinn, and Sentner walked from Mrs. Worley's house toward the corner of Regal Court and 27th Street East. Halfway down the street, they passed defendant's house. Defendant came out of his garage with a black pool cue in his hand, yelling obscenities and threats. Two other people came out behind him. Neither Baggett nor Quinn had ever seen defendant before. Sentner told Baggett and Quinn that defendant and his friends were the people who had beaten him. Sentner took a few steps in the direction of defendant and his companions before Baggett and Quinn were able to persuade him to walk away.

While Baggett, Quinn, and Sentner continued toward the end of the street, defendant walked behind them. When the trio reached the corner of Regal Court and 27th Street East, Baggett told Sentner to keep going and Baggett and Quinn turned around to go back to their grandmother's house. Defendant, still holding the pool cue, stood in front of Baggett and told him in a threatening manner to get off the street. Baggett told defendant he did not want to fight. Defendant's companions tried to dissuade defendant by saying, "Let's go back," but he ignored them.

After defendant continued to block their path, Baggett and Quinn turned around in an attempt to avoid him and continued to walk back to their grandmother's house. Baggett crossed to the east side of the street and Quinn stayed on the west. Baggett saw defendant swing the pool cue at Sentner, who was still standing on the corner. Baggett could not recall whether Sentner was hit. Then he saw defendant follow Quinn down the sidewalk and hit him in the back with the pool cue, causing it to break in half. Sentner remained on the street corner.

As Quinn was walking up 27th Street, defendant was behind him. Out of the corner of his eye, Quinn saw defendant swing the pool cue at him. The cue hit him and broke on impact, and he saw the rest of it fly in front of him. Baggett told Quinn to keep walking.

After hitting Quinn, defendant went to Baggett and started tapping him on the shoulder with the remains of the pool cue. Defendant continued to threaten Baggett, saying he did not want to see him there again. He hit Baggett on the back of the head with the pool cue. Defendant then put his left forearm on Baggett's throat and threw his weight on Baggett's back, knocking him down. Defendant hit him in the head with his fist, perhaps 11 or 12 times. Baggett did not fight back. Baggett told defendant that he was not with Sentner. Defendant got off Baggett, hit him in the back with the broken pool cue, "jumped on [his] back again," and "wa[i]led away with both fists," displacing Baggett's nose. Neither Baggett, Quinn, nor Sentner threatened defendant in any way.

Quinn, who had walked ahead, looked back and saw that Baggett "was on the ground and [defendant] had him in a headlock and was just swinging, hitting him in the face." Quinn continued down the street for another 30 to 40 feet and turned around. He observed that Sentner was down and defendant was "standing over him swinging." Baggett was still lying on the ground and trying to get up. Quinn kept walking. When he looked back again, Baggett was running toward him and they met at the next corner. At that point, Baggett "turned around and looked down the street as soon as [he] got to the stop sign" and was able to see defendant "repeatedly swinging and striking [Sentner] with a pool cue." Baggett admitted that he "didn't see that clearly because [his] eyes were swollen by that point," but said that this limitation affected only his ability to see the specific part of Sentner's body defendant was hitting. He also saw the broken part of the pool cue lying in the middle of the street. Baggett said "there was nothing to impede [his] view."

Baggett and Quinn walked to Baggett's mother's house. When they arrived, someone at the house photographed their injuries and called the police. After cleaning up, Baggett and Quinn returned to their grandmother's home, where they met with Sheriff's deputies.

Deputy Mikeal Smith and his partner Deputy Robert Claus spoke to Baggett and Quinn. After they said that defendant had assaulted them, the deputies went to his house

and interviewed him. Defendant told them he did not know anything about an assault, claiming he had been around the house all day. Defendant was arrested.

After the deputies had interviewed Baggett and Quinn and had taken defendant into custody, David Worley took Deputy Claus into the desert to show him where Sentner was camping. Deputy Claus took a photograph of Sentner's injuries and called paramedics to take him to the hospital. Sentner was "excited" and in distress because of his injuries and told Deputy Claus "[t]hat Oscar hit him." The contact between Deputy Claus and Sentner took place approximately 90 minutes after Sentner sustained his injuries.

DISCUSSION

Defendant claims counsel was ineffective by failing to cross-examine Baggett regarding his ability to see who was beating Sentner. He contends that counsel could have established that Baggett was too far away to see the incident.[1] In order to secure a reversal of a conviction based on ineffective assistance of counsel, a defendant faces two hurdles. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).)

Notwithstanding the two-prong test used in evaluating whether counsel was ineffective, the Supreme Court went on to note that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the

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[1] By using the streets as references, he claims Google maps show that Baggett made his observations while he was approximately 1,000 feet from where Sentner was attacked.

defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland, supra*, 466 U.S. at p. 697.) "It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a 'reasonable probability' that absent the errors the result would have been different. [Citations.]" (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008.) Defendant failed to meet that burden.

Even assuming that adroit cross-examination would have caused the jury to doubt whether Baggett could have seen defendant striking Sentner, other evidence convincingly established defendant's identity as Sentner's attacker. Baggett testified to defendant's intent to injure Sentner. He said that before striking Quinn, defendant swung the pool cue at Sentner. At that point, Sentner was standing on the corner Baggett "had just walked away from." Quinn related that after defendant assaulted him and Baggett, he saw Sentner on the ground "with [defendant] standing over him swinging." Defendant does not suggest that Baggett and Quinn were unable to clearly see those events. The evidence established that defendant was the aggressor. There was no dispute defendant and Sentner had an argument earlier that evening. Baggett and Quinn testified that defendant chose to follow Sentner after seeing him in their company. Although the victims attempted to avoid defendant, he pursued and subjected them to an unprovoked attack. There was no evidence anyone else was involved in assaulting the victims. In fact, Quinn stated that two of defendant's friends were behind him, saying, "Let's go back." Finally, the evidence establishing defendant's identity as the sole individual who assaulted Sentner's companions provides compelling circumstantial evidence that he attacked Sentner as well.

We conclude defendant was not prejudiced by his attorney's alleged failure to cross-examine Baggett.

Defendant also contends that counsel was ineffective by failing to object to the admission of Sentner's statement that defendant hit him, which was elicited through the testimony of Deputy Claus. Defendant argues the introduction of Sentner's statement

violated his Sixth Amendment right to confrontation as defined by *Crawford v. Washington* (2004) 541 U.S. 36. The Attorney General asserts Sentner's statement was not barred by *Crawford*, claiming there was no indication it was made during a formal interrogation. We need not resolve the issue. Assuming the admission of Sentner's statement constituted federal constitutional error, the error does not require reversal of the conviction if we are "able to declare a belief that it was harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24.) We are.

There was no question that Sentner was the victim of a vicious assault. Deputy Claus testified that Sentner's injuries were so severe that paramedics were called to take him to the hospital. Sentner's statement did nothing more than identify defendant as his attacker. Absent the statement, the evidence establishing that fact was overwhelming.[2]

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J. WILLHITE, J.

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[2] On June 2, 2009, defendant filed a petition for writ of habeas corpus, raising the identical claim of ineffective assistance of counsel. For the reasons stated in the opinion, the writ is denied.